

DBA INTERNATIONAL'S COMMENTS RELATED TO DEBT COLLECTION FOR THE FTC DEBT COLLECTION WORKSHOP

INTRODUCTION

DBA International (“DBA”) is pleased to submit to the Federal Trade Commission (“Commission”) these comments on issues related to debt collection and debt buying. Pursuant to the Commission’s request, DBA’s comments will focus on an overview of debt buying, the initial purchase, technology, debt verification, and consumer awareness. DBA recognizes the Commission’s desire for greater understanding of debt buying in its ongoing efforts to ensure full compliance with the Fair Debt Collection Practices Act (“FDCPA”). DBA hopes that the information provided herein will assist the Commission in deciding whether to recommend legislative changes to Congress.

OVERVIEW OF DEBT BUYING AND DBA

Debt buying began over forty-five (45) years ago but has become more widely practiced in the last ten (10) years as more consumer credit originators, especially federal and state chartered banking institutions, sell increasing amounts of charged off receivables. Upon the purchase of a portfolio of charged-off receivables, a debt buyer as assignee takes subject to all the rights, title, and interest of the assignor to the indebtedness as

well as to any applicable defenses of consumers with respect to their debts. Debt sales of accounts other than those originated by banks also have become as commonplace and are as accepted a practice as the sale of mortgages. Examples of the types of charged-off receivables sold to debt buyers include accounts from credit card originators, telecom providers, retail merchants, and utilities.

While there are hundreds (if not thousands) of entities purchasing debt, there are only five publicly traded debt buying companies.¹ Three of these publicly traded debt buyers² collectively purchased over \$77 billion dollars, face value, of charged-off debt from December 31, 1996 through December 31, 2006, for which they paid a total purchase price in excess of \$1.8 billion dollars.³ Publicly traded debt buyers as well as several large privately-owned companies purchase many of the larger portfolios, including large credit card portfolios, directly from the originators. However, there are many smaller debt buyers that are active in the debt buying marketplace as well purchasing a wide variety of debt types portfolios, and that are also active in trade organizations such as DBA. It has been estimated that debt buyers, including those which are publicly

¹ Asset Acceptance Capital Corp., Portfolio Recovery Associates, Inc., Encore Capital Group Inc., Asta Funding Inc. and FirstCity Financial Corp.

² Asset Acceptance Capital Corp. (“AACC”), Portfolio Recovery Associates, Inc. (“PRAA”) and Encore Capital Group, Inc. (“ECPG”)

³ Data for calculations derived from the 2006 Annual Reports of AACC, PRAA, and ECPG.

traded, are active in the annual purchase of over \$100 billion dollars in face value of delinquent credit card debt alone.⁴

One possible reason why more debt has become available for sale in the United States is the statistical fact that consumer debt has climbed to \$2.4 trillion dollars as of the second quarter of 2006.⁵ In general, higher volumes of debt lead to higher levels of charge-offs. The supply of delinquent consumer debt for purchase does not appear as though it will decrease any time in the near future.

Many other factors also contribute to the availability of increasing amounts of consumer debt and, as noted above, debt buyers are expanding the categories of debt they will purchase. It seems clear that the growth phase of the debt buying industry is still underway.

DBA, formerly known as the Debt Buyers Association, was formed in 1997 as a trade association for debt buyers. DBA currently has 484 professional debt buyer member companies and 120 vendor and affiliate member companies. DBA provides a forum for debt buyers to exchange ideas and information. DBA also provides information to its members on legal issues, including the FDCPA and other consumer-related statutes through an annual convention, an executive conference, newsletters, and a website. DBA has a strict code of ethics which states that its members must comply with the Federal Fair Debt Collection Practices Act, the Fair

⁴ Kaulkin & Ginsberg, GLOBAL DEBT BUYING REPORT, March 2006, p. xxviii.

⁵ Federal Reserve Statistical Release, G.19, CONSUMER CREDIT, August 7, 2006 at 1, (2006).

Credit Reporting Act, and any additional State laws which may be more stringent. Further, DBA provides networking and educational opportunities for its members and facilitates the sharing of information among debt buyers with regard to the actions of Congress and state legislatures.

Generally speaking, debt buyers are either “active” or “passive.” An active debt buyer is one which purchases portfolios and itself engages in direct collection activity. In contrast, “passive” debt buyers own a debt portfolio or an interest in a debt portfolio but do not seek to collect on the debt directly; these companies outsource the collection of the portfolios to traditional collection agencies or law firm debt collectors. This distinction between types of debt buyers is significant as passive debt buyers are generally not subject to the FDCPA since they do not communicate with the consumer in an attempt to collect the debt.⁶ Further, passive debt buyers might not be subject to licensure as a debt collector.⁷

Debt buying and collecting is a thoroughly regulated industry, and in general is subject to the following federal laws: (1) Fair Credit Reporting Act (“FCRA”); (2) Fair and Accurate Credit Transaction Act of 2003 (“FACT Act”); (3) Financial Privacy Rule and Gramm-Leach-Bliley Act (“GLB”); (4) Safeguard Rule; (5) Electronic Funds Transfer Act (“Reg. E”); (6) Telephone

⁶ See Sally v. Hilco, 392 F. Supp. 2d 1036 (N.D. Ill. 2005); Schutz v. Arrow, 465 F. Supp. 2d 872 (N.D. Ill. 2006).

⁷ Selected Opinion 06-060, Deputy Commissioner of Banks, State of Massachusetts, June 16, 2006.

Consumer Protection Act (“TCPA”), and (7) Health Insurance Portability and Accountability Act (“HIPAA”). Additionally, depending on their activities, debt buyers may be subject to state and local statutes relating to credit and debt. These statutes are oftentimes even more stringent than the federal statutes and, in states where licensing is required, debt buyers may be subject to on-site audits and any other enforcement powers given to state licensing bodies.

DBA provides its members with information and education on each of the above-referenced laws. In addition, many debt buyers have internal legal, training and compliance programs to ensure that their employees comply with these laws. Consistent with the principles of DBA, a debt buyer’s compliance with federal, state and local laws enables it to provide quality assurances to creditors selling charged-off receivables that their debts will be collected in an ethical manner and in accordance with applicable law. Given the reputational risks associated with the sales of debt portfolios (e.g., the negative impact on a debt seller’s business resulting from lawsuits or unfavorable publicity), the ability of debt buyers to provide such assurances is critical.

Moreover, debt buyers do not necessarily rely solely on the DBA for information with respect to compliance issues. There are other trade groups with similar goals and many debt buyers are members of these groups as well. Most debt buyers also employ internal and external

counsel who oversee not only the due diligence aspects of their debt purchases but also the implementation of various measures designed to ensure compliance with all applicable state and federal laws.

The advent of debt buying and the growth in the number of debt buyers appears to have preceded consumer comprehension of the debt buying industry. In recent years, however, consumer awareness that a debt may actually be owned by an entity other than the original creditor has significantly increased. The legal system's understanding of the vital role of debt buying in the operation of financial markets has similarly expanded. As Judge Richard A. Posner, a frequent author of opinions for the United States Court of Appeals for the Seventh Circuit, stated in *Olvera vs. Blitt & Gaines*, 431 F.3d 285 (7th Cir. 2005):

There is an innocent reason that creditors assign collection to other firms rather than doing it themselves. It is the same reason that most manufacturers sell to consumers through independent distributors and dealers rather than doing their own distribution. Outsourcing phases of the total production process facilitates specialization, with resulting economies. Specialists in debt collection are likely to be better at it than specialists in creating credit card debt in the first place.

Id. at 288.

DUE DILIGENCE AND TECHNOLOGY

Technology is an integral tool of the debt buyer. It is utilized not only in debt collection but prior to the purchase of a portfolio in connection with the debt buyer's due diligence activities on any portfolio it

is considering purchasing. Even before a debt buyer begins analyzing a portfolio, it will use some of the most sophisticated data encryption available in today's market to ensure that consumer data is protected from inadvertent release. The analysis itself will typically involve quantitative and qualitative analyses to determine the collectability of a given portfolio, the legal risks associated with that portfolio, and the factors or accounts that should be excluded. A debt buyer may request exclusion of accounts that (1) are pending or have been pending in bankruptcy, (2) involve alleged or established fraud, (3) have been paid prior to purchase, (4) are the accounts of deceased debtors, and/or (5) are other "problem" accounts.

A purchase agreement will typically delineate which debts are to be excluded and will contain the seller's binding representations and warranties as to the debts that are being sold. Typical warranties and representations generally address title to and validity of the accounts and the integrity of the data transmitted. They also include representations that the accounts were originated in compliance with all applicable laws; no past or present litigation will impact the accounts; and no 1099-C's have been issued. Other specific warranties also may be requested. Although contractual negotiations as to representations and warranties do not appear to be a technological area, it is important to understand that the initial negotiations employed by debt buyers prior to purchase are

intended to assist with the utilization of technology to import and collect only on valid accounts.

After accounts are purchased, the debt buyer will import data from the seller via a secure site ("FTP") into the debt buyers protected and oftentimes proprietary data base which will contain security protections for consumer privacy. The initial data provided by the seller often includes information such as the date of delinquency, the date of last payment, last known address, balance due, the debtor's personal identification information, and the history of the account. The debt buyer commonly will further review the accounts for bankruptcies and deceased debtors using services such as LexisNexis®-Banko® and will perform stratification on this information as well. The debt buyer may use various address update and location services and conduct permissible pulls of credit bureau reports for location information.

Many larger debt buyers will furnish trade lines on the consumers' credit bureaus reports on purchased accounts. If a debt buyer reports a trade-line to a credit reporting agency, it is required to utilize the "e-Oscar"® (the Online Solution for Complete and Accurate Reporting that was developed by Equifax, Experian, Innovis, and Trans Union). The e-Oscar® system allows the debt buyer or other furnisher to respond to Consumer Data Verifications ("CDV") and allows for the processing of Universal Data Forms ("UDF") to quickly update consumer trade-lines.

Moreover, a debt buyer as a data furnisher under the FCRA may provide updated credit bureau data via the Metro II Guidelines.⁸ These updates are furnished on an ongoing basis and for such matters as disputes, healthcare accounts, payments, and settlements. Use of these proprietary services further promotes the security of the information transmitted.

Other technology is available and is utilized to optimize and manage large volume collection efforts. This includes, but certainly is not limited to, the use of a letter vendor to assist with the letter mailings. Letters can be bar-coded to track and notate returned mail directly to the debt buyer's computer system. Similarly, on-line phone directory services allow greater access to up-to-date telephone numbers as society becomes increasingly mobile. All of these technological products and services foster the privacy and security of debtor information.

Debt buyers collecting debt directly also utilize technology in their dealings with debtors—albeit more cautiously. Various internet-based payment portals providing for online payment quite often are made available to expand the number of options a debtor has for satisfying his or her debt. However, notwithstanding the widespread use of e-mail for both business and personal communications these days, privacy considerations stemming from a concern that third parties may have

⁸ To assist data furnishers (such as banks, credit unions, consumer credit card companies, retailers, and auto finance companies) in this process, the credit reporting industry has adopted a standard electronic data reporting format called the Metro 2 Format.

access to a consumer's e-mail are limiting debt buyers' use of e-mails in and for communication with consumers about their debts.

Technology has certainly made possible greater accuracy in collecting on debts. However, some laws governing the use of technology have resulted in what are apparently unintended consequences. For example, debt collectors are uncertain as to the application of the TCPA to the use of automated dialers to contact consumers on their cell phones. Currently, the TCPA prohibits an automated dialer from calling a cell phone and requires that cell phone numbers be removed from automated dialers. But local number portability has allowed consumers to transfer land numbers to cell numbers⁹ since the effective date of the Telecommunications Act of 1996¹⁰. Debt buyers oftentimes find it difficult to identify a cell phone unless the consumer specifies that (s)he is calling from a cell phone and/or advises that (s)he has changed a particular land line to a cell phone. There is a concern that a debt collector may also inadvertently and unintentionally violate the FDCPA under this scenario if this Act is applicable. Section 1692(f) (5) of the Act prohibits a debt collector from having a consumer incur an additional charge in the collection of a debt. With the transportability of numbers and the ability to forward calls, it is quite possible for a debt collector to unknowingly make a call to a cell phone which results in an additional charge to the

⁹ 47 U.S.C. § 227 (2005) [Restrictions on the Use of Telephone Equipment].

¹⁰ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

debtor, thereby arguably violating 11 U.S.C. § 1692(f)5. With approximately 12.8% of households in the United States using only wireless telephones¹¹ and with this percentage apparently on the rise, there must be clarification of the applicability of the TCPA and the FDCPA to cell phones.

DOCUMENTATION OF DEBTS

In the “FTC Annual Report 2007: Fair Debt Collection Practices Act,” the Commission notes that 2.5% (1,752) of the overall (69,204) FDCPA complaints alleged a failure to verify debts. Debt buyers recognize the many problems connected with debt verification, and continue to expend a great deal of time and money to fully and expeditiously address requests for verification.

The procedures followed by most debt buyers include marking the debt as “disputed,” reporting the dispute to the Credit Bureaus on the consumer’s trade-line, ceasing communication until the verification is sent, and ultimately providing verification. Oftentimes, a debtor’s request for verification is not timely made [i.e., within thirty (30) days of the date of the written communication from the debt collector informing the debtor of the debtor’s right to receive verification as required by 15 U.S.C. § 1692g(b)] which makes verification technically unnecessary prior to the

¹¹ July –December 2006 National Health Interview Survey (“NHIS”).

debt collector engaging in any further collection efforts. Nevertheless, in an effort to resolve the dispute, many debt buyers will provide the verification outside of the legally-required validation period.¹²

A debt buyer may not receive all the documentation on a particular debt at the time of the purchase. In fact, it is common for a debt buyer initially to receive only a computerized summary of the creditor's business records, which information is imported into the debt buyer's business records. The due diligence process and representations and warranties in the purchase agreement help ensure the accuracy and integrity of the debts sold and provide some protections if the information provided is insufficient or incorrect. The agreement also may address the issue of furnishing more complete data on a particular debt, if necessary.

The verification problems connected to purchased debt are compounded by the unfortunate perception among consumers that verification of a debt encompasses all statements, charge slips, applications, and payment histories (and often times even more information). Verification as required by the FDCPA, however, involves nothing more than the debt collector confirming in writing that the amount being demanded is what the creditor is claiming is owed; the debt collector is not required to keep detailed files of the alleged debt.¹³

¹² See Robinson v. Transworld Sys., 876 F. Supp. 385 (D.N.Y. 1995). The right to request verification persists only for 30 days from the receipt of the validation notice under 15 USC 1692g(b).

¹³ Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999)

As indicated, debt buyers routinely respond to untimely requests for verification and request documentation from creditors or prior assignors beyond what is legally necessary for verification in an effort to cooperate and discuss resolution of a debt. It is important to note, however, that courts have held that a debt buyer filing a collection suit without full documentation at the time of the suit, does not violate the FDCPA.¹⁴ Moreover, Federal Rule of Evidence 803(6) (relating to hearsay exceptions for records of regularly conducted activity) has been interpreted to be applicable to the admission of account records initially generated by the original creditor but later held by the debt buyer. *Miller v Javitch*, 397 F. Supp. 2d 991, 997-98 (N.D. Ind. 2005). In the *Miller* case, the Court accepted an affidavit of the debt buyer's attorney that included the electronic file from a prior assignor. Based upon the declaration of authenticity in compliance with the Rule, the Court determined that it could consider the electronic file of the assignor.

CONSUMER AWARENESS

Technology has advanced the flow of information to consumers as it has debt buyers and consumers are increasingly more able to educate themselves as to their rights. For example, the Commission's website www.ftc.gov has numerous consumer education pages and links. The

¹⁴ *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324 (6th Cir. 2006) .

Commission's site allows a consumer to file an on-line complaint and provides useful and informative links for the consumer. This is only one of many other informative and free on-line resources available to consumers through various government programs.

Unfortunately, a great deal of the information on the internet is inaccurate and ill-informed. Many consumer based web-sites are commonly known as "debtor scams." Many even contain incorrect legal information from non-attorneys, and are aimed only at selling form letters or books on how to avoid a debt. These consumer sites, while providing opinions on numerous debt buyers, often compel the consumer to send contradictory letters which may simultaneously request verification of the debt but request a cessation of communication. Certain sites may advise consumers to record conversations without disclosing that many states have two party consent statutes for the recording of conversations.

Some consumer law firms give consumers information that would appear to guarantee success at either avoiding the debt, or success and financial rewards for suing debt collectors. In short, consumers may unwittingly fall prey to misinformation that could result in a debt buyer to filing an unjustified suit because the consumer has been ill-advised to refuse to pay a justly owing debt.

CONCLUSION

The practice of debt buying is becoming a greater part of the credit and collection process. The members of DBA strive to insure compliance with the FDCPA, the FCRA, and related consumer laws. Through the use of due diligence and technology, DBA members seek only to ethically collect on valid and enforceable accounts while safeguarding the privacy of the consumer. While consumers are more aware now of legal rights due to the advent of the internet, there is a proliferation of mis-information that consumers may unwittingly believe to be accurate. DBA looks forward to working with the Commission on these matters at the upcoming workshop.

Respectfully submitted,

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